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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHRISTOPHER CLEAR,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E050414

(Super.Ct.No. FSB900752)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of prohibition. Kyle S. Brodie,
Judge. Petition granted in part and denied in part.

Doreen Boxer, Public Defender, and Joy L. Hlavenka, Deputy Public Defender,
for Petitioner.

No appearance for Respondent.

Michael A. Ramos, District Attorney, Grover D. Merritt and Brent J. Schultze, Deputy District Attorneys, for Real Party in Interest.

Petitioner was charged with violating Penal Code¹ sections 530.5 (count 1, identity theft) and 529 (count 2, false personation).

Following the preliminary hearing, the magistrate found insufficient evidence to hold petitioner to answer the identity theft charge in count 1 but held him to answer on count 2 for false personation.

The People filed an information charging both crimes.

Petitioner filed a 995 motion as to both counts. The superior court denied the motion as to both counts and petitioner seeks review pursuant to a section 999a. We grant the petition for writ of prohibition in part and deny it in part, concluding that the prosecution failed to establish the offense of identity theft.²

DISCUSSION

The evidence presented at the preliminary hearing showed that petitioner created a page on the MySpace Web site purportedly in the name of a pastor of a church. Petitioner and his family had left the church about a year before the pastor

¹ References are to the Penal Code unless otherwise stated.

² The court has read and considered the record as well as the petition and response and has concluded that an alternative writ would add nothing to the presentation already made and would cause undue delay in bringing the action to trial. We therefore issue a peremptory writ in the first instance. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4.)

discovered the Web page. The Web page purports to be written by the pastor and contains statements that he has engaged in homosexual activity and narcotics use. The pastor reported to a detective from the San Bernardino County Sheriff's Department that these statements are false. The pastor expressed concern because he is the pastor of a church ruled by a board of trustees and a higher church echelon and such allegations could influence board members to fire him and church members to leave. He said that church members had questioned him about the Web page and some had left, although he had not been fired.

When contacted by a law enforcement officer, petitioner admitted he had created the MySpace Web page and did so without the pastor's permission. He initially said he did it as a joke, but then added that he and his sister had attended a high school affiliated with the church and he was upset with his sister's treatment when she graduated with honors. Petitioner admitted he knew that the pastor could suffer shame and humiliation as a result of the Web page.

I. Identity Theft:

Section 530.5, subdivision (a), reads in part: "Every person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense."

Thus, the elements of identity theft under section 530.5 are that: (1) the person must willfully obtain personal identifying information of another person; and (2) the

defendant must use that information for an unlawful purpose without the person's consent. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533 (*Tillotson*).)

Petitioner acknowledges that the crime of identity theft is not necessarily limited to instances with financial motives as long as the information was used for an unlawful purpose. There is no authority that the commission of civil tort, such as defamation, constitutes an unlawful purpose. Rather, he notes that California used to have criminal libel and slander laws but those laws have been repealed.

In *Tillotson*, the court found sufficient evidence to convict the defendant under section 530.5, subdivision (a), where she obtained a police officer's personal information from various sources and provided that information to a third party to conduct surveillance of the officer. Prior to her contracting with the third party, the officer had obtained a restraining order against defendant preventing her from, among other things, conducting a surveillance. The third party never conducted the surveillance, but a jury convicted the defendant of attempted violation of section 166, subdivision (c)(4). Thus, the court concluded that the defendant had used the identifying information for an unlawful purpose and was guilty of violating section 530.5. (*Tillotson, supra*, 157 Cal.App.4th at p. 533.)

The prosecution argued in opposition to the 995 motion that petitioner violated the false personation statute, section 529, and that it was for an unlawful purpose. In

addition, it argued that petitioner had violated section 653m,³ using an electronic communication device with intent to annoy. This latter statute proscribes making obscene telephone calls and requires that the defendant make contact with the victim. While it is true, as the prosecution indicates, that the pastor did view the Web page, this contact was fortuitous. Thus, this statute cannot fulfill the unlawful purpose element of identity theft.

We cannot accept the prosecution's other argument that the offense of false personation can constitute the unlawful purpose element of identity theft because this theory is nothing more than a tautology: petitioner stole the victim's identity for the unlawful purpose of posing as the victim.

II. False Personation:

Section 529 prohibits anyone to falsely personate another in either his private or official capacity and in such assumed character either: "3. Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person." (§ 529, subd. 3.)

³ Section 635m provides in part: "(a) Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor."

False personation is punishable as either a felony or a misdemeanor. It requires an act additional to the false personation. Petitioner argues that he did not commit any act additional to the false personation. We disagree.

In *People v. Cole* (1994) 23 Cal.App.4th 1672 (*Cole*), the defendant was arrested and orally identified himself to the arresting officer as “Larry Quesenberry” and provided Quesenberry’s date of birth. When the officer asked the defendant if his middle name was “Ray,” which was Quesenberry’s middle name, the defendant replied affirmatively. (*Cole*, at p. 1674.) The defendant challenged the sufficiency of the evidence to support his false personation conviction. He argued that there was no evidence that he had committed the required “act,” in addition to the false personation itself, which was required for a conviction under section 529. (*Cole*, at p. 1675.) The Attorney General maintained that the defendant’s providing a date of birth and affirmative response to the query about a middle name constituted the required act. The appellate court rejected this contention. Giving a false birth date and middle name was no more than part of the act of providing the false information upon which the false identity was based. Each statement made in the course of providing contemporaneous statements amounting to false identification logically cannot be construed as separate acts compounding each prior statement.

Cole holds that section 529, subdivision 3, requires an action by the defendant in addition to providing false identification to the arresting officer. (*Cole, supra*, 23 Cal.App.4th at pp. 1674, 1676.)

In contrast, the court in *People v. Chardon* (1999) 77 Cal.App.4th 205, upheld a defendant's section 529, subdivision 3, conviction on the grounds that the defendant, in addition to falsely representing herself as her sister to a police officer, signed her sister's name on a traffic "citation's 'promise to appear,' " thus exposing her sister to criminal liability for the traffic citation and for failing to appear at the scheduled hearing. (*Chardon*, at pp. 209, 212.) The court rejected the defendant's argument based on *Cole* that her act of signing her sister's name to the citation was part of her original act of false personation. Instead, the court observed that "section 529 only requires that there *be* an additional act by the perpetrator which exposes the impersonated person to liability or benefits the perpetrator or another." (*Chardon*, at pp. 212-213.)

Here, petitioner did more than publish a MySpace Web page using the pastor's name. He published numerous statements, which arguably could have subjected the pastor to defamation actions or to be terminated from his position in the church.

DISPOSITION

Let a writ of prohibition issue directing the superior court to set aside its order denying petitioner's section 995 motion to dismiss count 1 of the information and to issue a new and different order dismissing count 1, but denying the motion to dismiss count 2.

Petitioner is directed to prepare and have the peremptory writ of prohibition issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

MILLER
J.